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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

NO. 445

IN THE MATTER OF
GEORGE R. JOSLYN,
BANKRUPT.

BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA,
Petitioner,
vs.
GEORGE R. JOSLYN, et al.,
Respondents.

Petition for Writ of Certiorari.

REPLY BRIEF
OF PETITIONER, THE BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA,

IN REPLY TO
BRIEFS IN OPPOSITION OF GEORGE R. JOSLYN, ARMIN F. HILLMER AND WADE FETZER, JR., ET AL.

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I.

The Conflict of Jurisdiction.

In all three briefs the state court order entered July 18, 1951 is treated as though it merely liquidated an unliquidated liability of the bankrupt. (Joslyn brief, pp. 7-9; Hillmer brief, pp. 6-10; Fetzer *et al.* brief, pp. 5-7).

The liability was not unliquidated. Its principal amount was formally admitted in the bankruptcy proceeding: the bankrupt scheduled it (Tr. 374-5); he admitted it in subsequent verified pleadings (Tr. 67-8, 119); and his counsel admitted it in a hearing (Tr. 72). This principal amount of the liability was never questioned by any party to the proceeding.

Nor did the state court make a judicial adjudication of the liability. The judge thought he was entering a consent order approved orally and in writing by counsel representing all parties (Tr. 396). He was misled to believe that all parties and interests were represented before him (Tr. 396).

Furthermore, the state court went far beyond purporting to determine the amount of the bankrupt's stock liability. It permanently enjoined the creditors from prosecuting their claims in the bankruptcy proceeding (Tr. 352, 357-8). It directed that the money be paid to the state court receiver, and distributed $50,972.79 of the $57,100.00 to Fetzer *et al.* (and their attorneys) (Tr. 260-267, 391-2). Fetzer, *et al.* were *shareholders,* not *creditors,* of the bank, and admitted in a verified answer in the bankruptcy proceedings that they were not creditors of the bankrupt (Tr. 315; see also Tr. 260-267; 391-2).

Respondents' argument as to *jurisdiction* is that because "the Superior Court retained jurisdiction *for the purposes*

of said class suit'' (Joslyn brief, p. 7), it also retained jurisdiction to wipe out and extinguish the provable claims against the bankruptcy estate (Fetzer, *et al.* brief, p. 9). (Inconsistently, the Fetzer *et al.* brief (p. 7) also argues that the state court order "did *not* adjudicate a claim against the bankrupt's estate.")

We are not concerned on this appeal with the question whether the state court did or did not have "jurisdiction *for the purposes of said class suit.*" This is not an appeal from the state court order. What we *are* concerned with is the order appealed from in the bankruptcy court which held that the bankruptcy claims were "extinguished by the state court order" as respondents' briefs maintain.

Clearly, if the bankruptcy court had paramount and exclusive jurisdiction to adjudicate the bankruptcy claims, as the unanswered and undisputed cases from this Court and the other Federal courts cited in our brief conclusively show (p. 26-7), then even if the state court "retained jurisdiction *for the purposes of said class suit,*" nevertheless the paramount and exclusive jurisdiction of the bankruptcy court over the allowance and satisfaction of the bankruptcy claims takes precedence over such retained jurisdiction in the state court and compels the conclusion that the bankruptcy order appealed from is in conflict with the Federal Constitution and Bankruptcy Act, and the Federal cases cited in our brief.

All of Respondents' opposition briefs ignore the following crucial facts: (1) that the consent order in the state court purported to extinguish and satisfy all the bankruptcy claims and enjoin their prosecution in the bankruptcy court; (2) that the District Court accepted the state court order as having such effect in bankruptcy and the Court of Appeals affirmed; (3) that the bankruptcy

creditors had been deprived of their right to interest against the "solvent" bankruptcy estate under bankruptcy law in the bankruptcy court; and (4) that the moneys distributed in the state court were largely paid to persons (Fetzer, *et al.*) who were not bankruptcy creditors at all, and whose claims were never asserted, and in fact never arose, until long after the bankruptcy adjudication.

All three briefs in opposition also ignore the following significant facts: 1) that before the bankrupt's attorney filed the father's petition in the state court suit (on July 12, 1951, Tr. 245-7) the bankrupt had submitted to the bankruptcy court for adjudication the amount of his stock liability and the interest issue (on June 30, 1950) (Tr. 67-70); 2) that, likewise before the filing of the father's petition in the state court suit, the bankruptcy court had: a) on June 30, 1950 exercised its jurisdiction to adjudicate these issues by referring them to a referee (Tr. 67), who conducted a hearing and filed a report on them (Tr. 127-183); b) taken the referee's report under advisement on April 20, 1951, and had it under advisement when the father's petition was filed in the state court suit (Tr. 242); and 3) that the state court had formal notice of the bankruptcy proceeding both through the filing of the bankrupt's answer pleading his discharge in the state court suit (Tr. 355-6), and by reason of the restraining order entered May 20, 1946 by the bankruptcy court (Tr. 385). [That the state court judge had actual knowledge of the bankruptcy proceeding when he entered the order of July 18, 1951 is shown by his statement at Tr. 390.]

The foregoing shows the irrelevance of §§ 11a and 63 of the Bankruptcy Act (11 U.S.C. §§ 29 and 103). The former merely authorizes a stay of state court proceedings until adjudication and discharge, or until dismissal of a bankruptcy petition; the latter refers specifically to judg-

ments entered prior to the bankrupt's discharge. Obviously neither is pertinent to this case.

The foregoing also shows the irrelevance of the following cases cited in the opposition briefs:

Cases not involving jurisdiction in bankruptcy: *Holley* v. *General American Life Ins. Co.*, 101 F. 2d 172; *Cooper* v. *Reynolds*, 77 U.S. 308; *Higginson* v. *Schoeneman*, 190 F. 2d 32; *Groves* v. *Farmers State Bank*, 368 Ill. 35; *Decker* v. *Domoney*, 387 Ill. 524; *Babka Plastering Co.* v. *City State Bank of Chicago*, 264 Ill. App. 142; *Leonard* v. *Bye*, 361 Ill. 185; *Walton* v. *Albers*, 380 Ill. 423; *Goldfarb* v. *Wright*, 135 F. 2d 188.

(The *Goldfarb* case is the only one which involves a bankruptcy proceeding; and it does not concern any conflict of jurisdiction. The bankruptcy proceeding had been dismissed before the filing of the state court suit; and the question at issue was whether or not the District Court should reopen the proceeding.)

Cases in which a trustee or assignee in bankruptcy voluntarily subjects himself to the jurisdiction of a state court by appearing therein to protect the interests of the estate: *In re McNulty*, 13 F. 2d 754; *Norton* v. *Switzer*, 93 U.S. 355; *In re Anton*, 11 F. Supp. 345.

Case involving the provability, in bankruptcy, of claims based on judgments rendered in other tribunals. *U. S.* v. *Paddock*, 180 F. 2d 121.

Cases in which the bankruptcy court authorizes the submission to state courts of unliquidated claims, where the interests of the estate will best be served thereby: *In re Martin*, 288 Fed. 184; *In re Buchan's Soap Corpn.*, 169 Fed. 1017. In the case at bar the bankrupt's stock liability was liquidated by his own admissions and pleadings in the bankruptcy proceeding.

Cases in which a bankrupt seeks relief from a state court judgment entered in a suit in which he has neglected to assert his discharge as a defense: *In re Innis,* 140 F. 2d 479; *Dimock* v. *Revere Copper Co.,* 117 U.S. 559. No such issue is present in the instant case; and the bankrupt did plead his discharge in the state court suit (Tr. 355-6).

Cases involving property in possession of a state court, attachments, or foreclosure of liens in a state court: *In re Tinkoff,* 141 F. 2d 731; *Davis* v. *Friedlander,* 104 U.S. 570; *Peck* v. *Jenness,* 7 How. 612; *Eyster* v. *Gaff et al.,* 91 U.S. 521; *Metcalf* v. *Barker,* 187 U.S. 165; *Town of Agawam* v. *Connors,* 159 F. 2d 360; *Connell* v. *Walker,* 291 U.S. 1. In the present case no property was in the possession of the state court, and no attachment or foreclosure was involved.

Cases involving the question whether a discharge in bankruptcy is a defense to a particular state court judgment or suit: *In re Devereaux,* 76 F. 2d 522; *Walters* v. *Wilson,* 142 F. 2d 59; *Hobbs* v. *Franklin Jewelry Co. Inc.,* 131 F. 2d 432; *In re Armour,* 186 F. 2d 503; *Boynton* v. *Ball,* 121 U.S. 457. No such question arises here.

The other cases cited by respondents on this subject are too far afield to require comment. None of them controvert the fundamental principles of law, establishing the paramount and exclusive jurisdiction of the bankruptcy court, cited in our brief, which are neither challenged nor answered in the opposition briefs.

The argument (Joslyn brief, pp. 9-11) that under the provisions of 28 U.S.C. §1738 the District Court was bound by the state court order, is fallacious. That enactment merely establishes a rule of evidence, not one of jurisdiction: *Wisconsin* v. *Pelican Ins. Co.,* 127 U.S. 265, 291 (1887);

People v. *Bruce,* 129 F. 2d. 421, 424 (C.C.A. 9th C. 1942), cer. den. 317 U.S. 678, rhrg. den. 317 U.S. 710. The question of jurisdiction is not foreclosed: *Milliken* v. *Meyer,* 311 U.S. 457 (1940); *Cook* v. *Cook,* 342 U.S. 126 (1951); *Sutton* v. *Leib,* 342 U.S. 402 (1951).

II.

Whether the Elks Is a Bankruptcy Creditor.

The Joslyn brief asserts (p. 1-3) that petitioner is not a creditor of the bankruptcy estate, citing the referee's report (Tr. 170-3).

This statement can scarcely be sincere, in view of the decision of the United States Court of Appeals in *In re Joslyn's Estate,* 171 F. 2d 159, 166-8 (C.A. 7th 1948-9). That Court said (p. 167, 168):

> "The question is not whether the Elks can maintain an action at law in the state court to recover on Joslyn's stock liability, but whether it has a provable claim in bankruptcy.
>
> "That it has such a claim is hardly to be doubted, both under the Federal and Illinois decisions. (citing *Brown* v. *O'Keefe,* 300 U.S. 598).
>
> * * *
>
> ". . . It is our view that the Elks has a provable claim in the bankruptcy proceeding, and we so hold."

No issue as to the provability of the Elks' bankruptcy claim was ever referred to the referee (Tr. 67-9, 72), and no hearing was ever had and no evidence upon the provability of the Elks' bankruptcy claim, or that of any other bankruptcy creditor, was heard by the referee. The referee's comments quoted from his report (Tr. 173) were made in connection with consideration of the petition of Fetzer, *et al.* also referred to him (Tr. 102); and signify merely that in the hearings before him no evidence was

submitted from which he could determine what bank creditors had claims against what stockholders, to which claims Fetzer, *et al.* would be subrogated under the theory of their petition mentioned by the referee at Tr. 159.

The other opposition briefs are more candid than the Joslyn brief by contending, not that the Elks was and is not a bankruptcy creditor, but that it ceased to be a creditor solely by reason of the state court order (Hillmer brief, p. 2, 6-9; Fetzer, *et al.* brief, p. 4, 8-9). The same argument is also made in the Joslyn brief (p. 9-12), where it is admitted that the creditors of the bank (necessarily including the Elks) held claims against the bankrupt; but there it is argued that under Illinois law the state court order and injunction were within the jurisdiction of the state court, and must be given full faith and credit in the bankruptcy court.

The class suit is, no doubt, a proper mechanism under Illinois law for enforcing the stockholders' liability; but while the amount of such liability is limited to the total amount of the bank liabilities accruing during the prescribed period, nevertheless the liability is a direct one to each creditor of the bank (including the Elks). This was the holding in *In re Joslyn's Estate,* 171 F. 2d 159, 166-7, and *Brown* v. *O'Keefe,* 300 U.S. 598, there cited. It is clearly the Illinois law: *Decker* v. *Domoney,* 387 Ill. 524, 527 (1944); *Burnett* v. *West Madison State Bank,* 375 Ill. 402, 406 (1940); *Burket* v. *Reliance Bank & Trust Co.,* 367 Ill. 196, 201 (1937); *Golden* v. *Cervenka,* 278 Ill. 409, 435-6 (1917).

In its opinion in the *Decker* case the Supreme Court of Illinois correctly states (p. 527): "Such liability does not accrue to the bank, but to the creditors, and the creditors of the bank, *either alone or by representative suit,* are the only

ones who can enforce the liability . . . *It is a several and individual liability on the part of each stockholder to each creditor.*" (Italics added.)

The United States Court of Appeals for the Seventh Circuit recognized that this was the law of Illinois in *Reconstruction Finance Corporation* v. *Barrett,* 131 F. 2d. 745 (1942) at page 748.

The class suit was nothing more than such a mechanism under the state statute for enforcing the individual liability of each stockholder to each creditor.

The wording of the last full paragraph on page 9 of the Hillmer brief implies that the Elks or its counsel had knowledge of the proceedings in the state court before the "satisfaction and release" of the bankrupt's liability. We do not believe counsel intend this implication as they well know otherwise.

On page 2 of the Joslyn brief counsel refer to a recent amendment of the Illinois Constitution abolishing double liability of holders of bank stock, but do not mention the express reservation of rights of creditors existing at the date of its adoption. (See Appendix, p. 16 of Joslyn brief).

The statement in the heading of point IV, p. 10, in the Joslyn brief misstates the facts. The state court order of September 20, 1951 did not deny the Elks' motion to vacate the decree of July 18. It denied the Elks' motion for leave to file its petition (Tr. 294).

The injunction order referred to under this point (by which the state court attempted to restrain the Elks and others from protecting their rights in the bankruptcy proceeding) illustrates the sharp issue of jurisdiction between the state court and the federal court which is presented by this case. This issue is one which this Supreme Court

should decide. If this Court fails to decide it, state courts can, and no doubt will, effectively nullify the rights of creditors in bankruptcy by so enjoining them from asserting their rights in the bankruptcy courts.

Under Point V the Joslyn brief argues (p. 12) that a distribution by the state court receiver would be fair while the distribution in the bankruptcy proceeding would not.

In the first place, the distribution actually made by the state court receiver paid $50,972.79 of the $57,100.00 to persons [Fetzer *et al.* and their counsel] who were not creditors of the bankrupt (Tr. 260-267; 315; 391-2). That was not an "equal and ratable" distribution as required by the bankruptcy law.

In the second place, the very function of a bankruptcy proceeding is to collect assets and make distributions in accordance with the act.

In the third place, this function is exclusively one of the bankruptcy court under its paramount jurisdiction.

Under the Bankruptcy Act, no single creditor or group of creditors can appropriate the bankruptcy assets to the exclusion of the others, as was done by the state court in this case.

It cannot be effectively denied therefore that the state court order would, if valid, prevent a proper distribution in this case, or that by the bankruptcy court's order based thereon the equal and ratable distribution required under bankruptcy law was effectively defeated in defiance of the fundamental principles of bankruptcy law.

III.

The "Equitable Attachment" Theory.

The Joslyn brief argues (p. 13-4) that the state court order "effected an equitable attachment" on the bankrupt's stock liability. No such argument is contained in the other opposition briefs.

The cited case of *Sanders* v. *Merchants State Bank*, 349 Ill. 547, 551-5 (1932), holds that under the present Illinois Constitution the filing of the representative stockholders' suit does not effect such an equitable attachment under Illinois law. As stated in the opinion, the much earlier case of *Thebus* v. *Smiley*, 110 Ill. 316, 319-320 (1884), was decided under a special bank charter which created a stockholder's liability entirely different from that imposed by the present Illinois Constitution, under which the Chicago Bank of Commerce was chartered, and which was construed in the *Sanders* case. The *Thebus* case held that, under that early charter, each individual stockholder was liable to be sued by each individual bank creditor; from which it followed that in the race for priority, the diligent creditors were rewarded with a prior right in the nature of an equitable attachment as against other more dilatory creditors. But as the *Sanders* opinion points out, all this was fundamentally changed by the adoption of the Illinois Constitution of 1870, which prevented any "prior lien" or "equitable attachment" being procured by any individual bank creditor against any individual bank stockholder.

IV.

The Illinois Divorce Case of Joslyn v. Joslyn, 337 Ill. App. 443.

The opposition briefs of Joslyn and Fetzer, *et al.* attempt to confuse the issues in this case with the divorce case of

Joslyn v. *Joslyn*, 337 Ill. App. 443. (Joslyn brief, pp. 4, 14-15; Fetzer, *et al.* brief, p. 10-11).

This reference to the Joslyn divorce case is a mere red herring and has no bearing upon any issues before this Court.

Likewise the reference to a claim upon alimony assignments is wholly irrelevant to this proceeding. It merits reply only because of the slur it casts upon the Elks' counsel. The claim was not, as there stated, one of the attorneys for the Elks. There is no such "claim of the attorneys for the Elks" as is mentioned on page 14 of the Joslyn brief. The issue in the cited Illinois Appellate Court case was solely whether the trial court, in a bitter divorce suit between the bankrupt and his wife, had erred in allowing counsel fees and expenses to one Fisher, as her attorney in the divorce case. This question did not concern the lien claim referred to, which was a claim against the wife, not the husband. Fisher was also counsel for the Elks and other creditors in the bankruptcy proceedings; but his claim against the wife was for services rendered her in the divorce case. If this Court regards this subject as pertinent, we ask that it read the opinion of the United States Court of Appeals in the case of *In re Fisher*, 179 F. 2d 361 (C.A. 7th C. 1950) cer. den. 340 U.S. 825. In that decision the Court of Appeals reviewed the entire matter and freed Fisher from the blame cast upon him, saying (179 F. 2d at p. 369) with respect to him:

> " . . . Respondent by his industry and energy not only uncovered and exposed but obtained an adjudication that Joslyn's discharge in bankruptcy was fraudulent. With little assistance and much opposition he sought to cause the bankrupt's beneficial interest in the trusts turned over to the bankruptcy Trustee for administration. On three different oc-

casions either the respondent or the position for which he stood has been vindicated by this court and now, ironically enough, he finds himself disbarred for a period of three years, and this without any finding of evil intent or bad faith, and without proof of injury to any person other than the one who has been adjudicated a fraudulent bankrupt. While the heart of the charges made against respondent is that he acted in a dual capacity for his own financial benefit, not a single word of complaint has been uttered against him, so far as we know, either as a witness or otherwise, by Mrs. Joslyn or her attorneys, or by the Elks or any of its representatives, or by any creditor of the bankruptcy estate."

V.

The Question of Interest.

The Hillmer and Fetzer, *et al.* briefs maintain that no interest is involved in this case, because no interest is allowable upon stockholders' liability under Illinois law and the Federal bankruptcy court is bound thereby, even though the bankruptcy estate is "solvent" (Hillmer brief, p. 11-2; Fetzer, *et al.* brief, p. 8-9). However, the Fetzer, *et al.* brief admits (p. 8) that interest is allowable upon stockholders' liability "where equitable considerations are shown to warrant the imposition of interest." (The Joslyn brief ignores the subject of interest entirely.)

The question whether or not interest is collectible upon bankruptcy claims in a "solvent" bankruptcy, before the surplus is available to the bankrupt, is a federal question within the exclusive jurisdiction of the bankruptcy court. The issue now before the Supreme Court is not whether interest is chargeable in this case, but whether or not the order of the Court of Appeals should be reviewed because (among other things) it affirmed an order of the District

Court whereby that court treated as valid and binding on it an order of the state court purporting to adjudicate the bankruptcy claim without interest, in violation of bankruptcy law.

The following cases cited on p. 12 of the Hillmer brief all recognize that under Illinois law interest is chargeable on bank shareholders' liability if (as in the present case) there be unreasonable and vexatious delay of payment or other circumstances (such as fraud) making the allowance of interest equitable: *Lewis* v. *West Side Trust & Savings Bank,* 376 Ill. 23. (In this decision it is expressly pointed out (p. 46) that there was "no claim of fraud . . . as a reason for allowance of interest"); *Cohen* v. *North Avenue State Bank,* 291 Ill. App. 558, 569-570; *Reconstruction Finance Corporation* v. *Goldberg,* 143 F. 2d 752, 759-761 (C.A.A. 7th C. 1944).

The other cases cited by respondents do not support their arguments.

In *Hillmer* v. *Block,* 315 Ill. App. 134, interest was denied specifically on the ground that it would be inequitable to allow it under the particular facts of that case.

The cases *Sanders* v. *Merchants State Bank,* 349 Ill. 547 and *Heine* v. *Degen,* 362 Ill. 357, do not deal with the question of interest. They merely refer to the principal amount of liability as the face value of the shares. That this does not negative interest is shown by the later decision in the *Lewis* case.

Munger v. *Jacobson,* 99 Ill. 349, was based upon a special charter issued before the adoption of the present Illinois constitution. The provisions of the charter are not reported. If pertinent, this decision is inconsistent with the *Lewis* case, in which the court particularly pointed out

(376 Ill. p. 47) that the *Munger* case involved a special charter and did not pass upon the question of interest under the present Illinois constitution.

The case of *Garvey* v. *Wilder,* 121 F. 2d 714, cites only the *Munger* decision to support the erroneous statement that "Illinois decisions hold that there is no liability for interest on stockholders' assessments."

Under Illinois law, liability for interest is not based solely on statutory provision, as argued on page 12 of the Hillmer brief.

Duncan v. *Dazey,* 318 Ill. 500, 527 (1925).
Golden v. *Cervenka,* 278 Ill. 409, 433 (1917).

We quote the following from the opinion in the *Golden* case (p. 433):

> "Neither the bill nor the cross-bill makes any claim for interest, and the case is not one of those in which the statute provides that interest shall be allowed. In equity, however, interest is allowed because of equitable considerations, and is given or withheld as under all the circumstances of the case seems equitable and just. (*Keady* v. *White,* 168 Ill. 76.) The Central Trust Company having received funds which belonged to the trust and savings bank, if it retained them without authority of law, should account for interest from the time a demand was made for payment, which was when the cross-bill was filed. *Whittemore* v. *People,* 227 Ill. 453."

But the fact that interest is allowable *under Illinois law* upon stockholders' liability in cases of fraud and vexatious delay (such as the present case) is really not relevant. The important point is that *under federal law* interest is allowed upon bankruptcy claims in proceedings in which there is a surplus returnable to the bankrupt. (See our brief in support of the petition, p. 27, second paragraph).

CONCLUSION.

The opposition briefs confirm the importance of a review by the Supreme Court of the Court of Appeals decision in this case. They demonstrate the extent to which the administration of estates in bankruptcy will depart from the provisions of the Bankruptcy Act if bankruptcy courts can lawfully abdicate their paramount and exclusive jurisdiction to state courts. They confirm our position, that the decision of the Court of Appeals defeats this paramount and exclusive jurisdiction, and constitutes a precedent destructive of the lawful administration of future bankruptcy proceedings by the Federal courts.

The writ of certiorari should issue.

Respectfully submitted,

THE BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA,
Petitioner,

by .....

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Attorney for Petitioner.

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I.

The Conflict of Jurisdiction.

The Joslyn Brief completely ignores the fundamental issue in this case, to-wit: the conflict of jurisdiction between the Bankruptcy Court, on the one hand, and the State Court, on the other.

Both of the other opposing briefs discuss this fundamental issue, but conclude by pretending that there is "no conflict of decisions" between the order appealed from and the basic principle of exclusive bankruptcy jurisdiction which constitutes the very core of Federal Bankruptcy Law. This basic issue cannot be escaped by pretending it does not exist (Hillmer, p. 17; Fetzer, p. 7, 10), or that it has no "peculiar gravity or general importance" of "public interest."

Both the Hillmer Brief (p. 8-9, 11-16) and the Fetzer Brief (p. 6-8) argue that the State Court had "jurisdiction over *the person* of the bankrupt", and conclude therefrom that the Bankruptcy Court was compelled, or at least had the "discretion," to cease further administration of the claims and estate in bankruptcy, upon the basically erroneous theory that the State Court order satisfied and discharged the bankruptcy claims against the unadministered bankruptcy estate. As the Hillmer Brief expresses it (p. 13), the State Court judgment was merely a judgment *in personam* "as distinguished from a proceeding *in rem*," citing *Callaway* v. *Benton*, 336 U.S. 132; *Nathanson* v. *N.L.R.B.*, 344 U.S. 25; *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478; *Dimock* v. *Revere Copper Co.*, 117 U.S. 559, the latter as "decisive of the issues herein" (Hillmer Brief, p. 12-14).

None of the cases so cited supports Respondents' arguments. In the *Callaway* case, this Court concluded "under the narrow facts presented here" that the Bankruptcy Court did not have exclusive jurisdiction over a controversy which "does not involve property of the debtor within the jurisdiction of the Bankruptcy Court," in a railroad reorganization case. The *Nathanson* case, as stated in our Petition (p. 13-14), held that the Bankruptcy Court does not have exclusive jurisdiction over a controversy

which could only be properly settled before the National Labor Relations Board. The *Thompson* case was one in which the Bankruptcy Court itself directed the Trustee in Bankruptcy to litigate an issue of state law in a State Court involving a question of title to local land.

As for the *Dimock* case, the issue was whether the Massachusetts State Court had jurisdiction to render a money judgment *in personam* against the bankrupt after bankruptcy and after discharge, in which State Court suit the bankrupt failed to assert the discharge. No bankruptcy question was involved. It was correctly held, as in many other similar cases, that the State Court had jurisdiction to render a money judgment *in personam* against the bankrupt outside of the Bankruptcy Court and after bankruptcy, in the absence of an assertion of his bankruptcy discharge, and that this Massachusetts judgment was entitled thereafter to full faith and credit in the New York Court, in which the *Dimock* case arose.

Plainly, none of these cases is relevant or "decisive" here, for in none of them did the Bankruptcy Court treat (as it did here) a State Court judgment, entered in a proceeding to which the Trustee was not a party, as conclusive upon the Bankruptcy Court to terminate the bankruptcy administration and prevent (1) the collection of bankruptcy assets, (2) the assertion and adjudication of bankruptcy claims, and (3) the distribution of the administrable bankruptcy assets in accordance with bankruptcy law.

The Hillmer Brief argues (p. 12-13) that, since the Bankruptcy Court obviously has some limited "discretionary powers" over the bankruptcy administration within the Bankruptcy Court, there is no conflict of jurisdiction between the Federal and State Courts in the case at bar, because the Bankruptcy Court exercised its discre-

tion "not to *interfere with the State Court proceedings.*" This is untrue; the Bankruptcy Court never exercised any such discretion in this case. The "interference" was with the Bankruptcy Court, not the State Court. No one ever asked the Bankruptcy Court to interfere with the State Court proceedings, nor did the Bankruptcy Court ever attempt to do so.

The issue is whether the Bankruptcy Court had the power to surrender its paramount and exclusive bankruptcy jurisdiction to the State Court. Certainly it had no "discretion" to abdicate its functions merely because it obviously had discretionary powers to control the bankruptcy administration within the Bankruptcy Court itself, under such provisions of the Bankruptcy Act as Section 11(b) and (c) and Section 63(b), to which Hillmer's Brief refers (p. 12). This is the real issue, and it is not referred to in any of the cases cited in the Hillmer or Fetzer Briefs.

The attempt in the Hillmer Brief (p. 15) to distinguish the leading cases a few of which are cited in the Petitioners' Brief (p. 13) dealing with the paramount and exclusive jurisdiction of the Bankruptcy Court is based upon irrelevant matters and differences in each instance and ignores the fundamental principle of exclusive jurisdiction in bankruptcy upon which these leading cases were decided. Moreover, none of Respondents' Briefs mentions the other important cases cited on pages 26-7 of the Petitioners' Brief in No. 445, although these added cases were also incorporated in both our Petition (p. 2) and supporting Brief (p. 12), in this cause No. 501.

The fundamental issue in this case is whether the Federal Bankruptcy Court had power or discretion to surrender its paramount and exclusive jurisdiction in bank-

ruptcy matters to the Superior Court of Cook County, Illinois, and the effect to be given to the latter's *in personam* judgment in the bankruptcy case. The Hillmer Brief squarely concedes that this conflict of jurisdiction is the "basic question" in stating the "Question Presented" (p. 6; also p. 8). The fact that the Joslyn Brief ignores this fundamental jurisdictional conflict, whereas the Fetzer Brief (p. 10) confesses that it cannot comprehend it, and the Hillmer Brief concludes by denying that such conflict exists (p. 17), merely shows the irrelevancy and inadequacy of the other points contained in Respondents' Briefs.

Our Points II to VI below serve only to meet the inconsequential and immaterial matters contained in the Respondents' respective opposing briefs.

II.

Respondents' Argument that New Jersey Equities Company is not a Bankruptcy Creditor.

Each of Respondents' Briefs argues that New Jersey Equities Company is not a bankruptcy creditor, and attacks the sufficiency of its bankruptcy claim (Tr. 335-6).

This contention is both irrelevant and without merit. It is irrelevant because, even if New Jersey Equities Company were not a bankruptcy creditor, the Petition in No. 501 is also filed by Horace A. Young, as Trustee in Bankruptcy, on behalf of all of the other bankruptcy creditors, including not only the Elks (Petitioner in No. 445), but also all of the other bankruptcy creditors whose bankruptcy claims are filed and still pending (with one exception), as well as those claims still to be filed, in the Bankruptcy Court. These other bankruptcy creditors who have already filed claims are Charles Ralph Johnston, Dr. Morris L. Parker, Vaughan Seed Store, Peter Bankson, Lewis E.

Pennish, Thomas B. McMartin, Edward J. Hargrave and George E. Hargrave, all of whom are Appellants herein (Tr. 403). The only creditor not appealing is Armin F. Hillmer.

As for the validity of the New Jersey Equities Company claim, the claim itself is in proper form, being filed upon standard Bankruptcy Form No. 29 (Tr. 335-6). No hearing *upon this claim or any other claim* has ever been had in the Bankruptcy Court (Tr. 142, 155), although the Trustee in Bankruptcy attempted unsuccessfully to secure an order of general reference for this purpose (Tr. 88-9, 127-8).

The Hubbard Brief (p. 6) and the Fetzer Brief (p. 2) argue that the New Jersey Equities Company's claim was filed without leave of the Bankruptcy Court and without notice to anyone. This contention is without merit. Bankruptcy claims are regularly and customarily filed with the Clerk of the Bankruptcy Court without leave or notice to anyone, under General Order II. There is no requirement in Section 57 of the Bankruptcy Act that any leave be obtained or any notice of the filing of claims with the Clerk of the Bankruptcy Court be given to anyone. As an ordinary matter of routine bankruptcy practice, tens of thousands of bankruptcy claims are regularly filed with the Clerk of the Court without leave or notice to anyone, many of such claims being filed by mail.

Both the Hubbard Brief (p. 7) and the Fetzer Brief (p. 3) attack the New Jersey Equities Company's claim upon the ground that no affidavit by the assignor is attached thereto as required by General Order No. XXI(3); and the Joslyn Brief also cites the pleading requirements under the Illinois Civil Practice Act where suits in the State Court are brought upon assigned claims. However, both

Briefs concede that General Order No. XXI(3) does not apply unless the claim was assigned after bankruptcy, which neither Brief alleges is the situation here.

As for the contention that the claim does not comply with the Illinois pleading law, be it said the Illinois Civil Practice Act has no applicability to bankruptcy claims, the form of which, as well as the manner of filing, is wholly governed by bankruptcy law.

Both the Joslyn Brief (p. 7-11) and the Fetzer Brief (p. 3-4, 8-9) argue that the New Jersey Equities Company has no provable bankruptcy claim because its claim against the Chicago Bank of Commerce did not accrue while George R. Joslyn was a stockholder, citing and quoting from *Holderman* v. *Moore State Bank*, 383 Ill. 534 at p. 540. This argument misapprehends the Illinois law. The Illinois courts do hold, as the *Holderman* case says, that *the measure of the total amount of each stockholder's liability* in a closed Illinois bank is limited to the total amount of the bank creditors' claims accruing during the period of stock ownership by each such stockholder; but once the *total amount of each stockholder's liability* has been thus determined and collected, *then such total amount must be ratably distributed among all of the bank creditors regardless of when their claims accrued. Heine* v. *Degan*, 362 Ill. 357; *Burket* v. *Reliance Bank and Trust Co.*, 366 Ill. 98; *Hillmer* v. *Chicago Bank of Commerce*, 375 Ill. 266; *Cohen* v. *North Ave. State Bank*, 291 Ill. App. 558; *Holderman* v. *Moore State Bank*, 383 Ill. 534, 543.

We quote from the paragraph in the *Holderman* case immediately preceding the quotation therefrom in the Fetzer Brief (p. 8-9):

> "It is true that under *Heine* v. *Degan, supra,* the moneys collected from the stockholders *must be distributed ratably to all the creditors, and not merely to those whose claims arose during the period of their stock ownership.*" (Italics added.)

The Referee correctly stated the Illinois law governing the ratable distribution of moneys collected from the stockholders among all of the bank creditors, as follows (Tr. 173):

> "The manner of distribution provided by Illinois law is an altogether different matter and does not concern the bankrupt's liability. After liabilities of bank stockholders have been paid to the receiver in a representative creditors' suit, *the money must be distributed ratably among all creditors of the bank.* See *Cohen* v. *North Ave. State Bank,* 291 Ill. App. 558, where the Court said at page 566:
>
> > 'Under section 11 of the statutes above referred to, and other authorities, we are clearly of the opinion that the money collected by the receiver in the liquidation suit, whether from the stockholders of the bank or from other resources of the bank, *must be distributed ratably to all of its creditors.*'
>
> Also see *Heine* v. *Degan,* 362 Ill. 357." (Italics added.)

It thus appears that Respondents are confusing the manner of determining the total amount of the stockholder's liability, with the right of the individual bank creditors to share ratably therein, once such liability is determined and paid by the stockholder. This right is conceded in the Hillmer Brief (p. 3, lines 3-4). There is nothing to the contrary in the Illinois cases of *Zimmerman* v. *Zeimer,* 363 Ill. 220 or *Leonard* v. *Bye,* 361 Ill. 185, which are cited in the Joslyn Brief (p. 9-11).

The Joslyn Brief argues (p. 8) that paragraphs 4 and 8 of the New Jersey Equities Company claim "indicate" that the claim is "invalid," because the Illinois State Receiver (not the Receiver in the stockholders' representative suit) "had a statutory duty to prove all unproved claims", and no showing has been made in this record as to "why the Receiver failed to do his statutory duty to prove this purported claim if such claim ever existed."

There has been no opportunity for the Equities Company to prove its bankruptcy claim, because *neither its claim nor any other bankruptcy claim* has ever been heard or adjudicated upon the merits in the Bankruptcy Court (Tr. 88-9, 142, 155). Paragraph 4 of the sworn claim itself positively states that no part of the amount claimed has been paid, no claim therefor having been filed with the State Court Receiver nor any dividend ever received thereon (Tr. 335). This allegation in paragraph 4 (like all other allegations in the sworn claim) must be assumed to be true until the claim itself has been heard and adjudicated upon its merits in the Bankruptcy Court.

The Hillmer Brief (p. 2-3) and the Fetzer Brief (p. 2) argue that there is no evidence in the record to support the statement on pages 2-3 of our Petition that there are two groups of bankruptcy creditors in this case, to-wit: the so-called "non-participating bankruptcy creditors" holding bankruptcy claims which are presently totally unpaid in the sum of $1,207,155.10, including New Jersey Equities Company, and the so-called "participating bankruptcy creditors" holding bankruptcy claims totalling $1,182,161.98, including The Benevolent and Protective Order of Elks of the United States of America.

The argument is (Fetzer Brief, p. 2) that the Court of Appeals did not positively state, though it made reference thereto in its opinion (Tr. 425), that such groups of "participating" and "non-participating" creditors existed, but that this is merely asserted by Appellants. Fetzer argues (p. 2) that the allegations in the Trustee's sworn Petition to this effect (Tr. 275-6) are denied by Fetzer's sworn Answer thereto (Tr. 312); and that no offer of proof was made by the Trustee so that "The controverted allegations of the Trustee's petition cannot be taken as proof."

There are two answers to this argument. In the first place, as the Trustee's sworn Petition itself shows (Tr. 276), the facts there alleged as to the "participating" and "non-participating" creditors are derived from the findings of fact by the State Court in paragraphs 6 and 15 of the State Court order of July 18, 1951 (Tr. 349, 351). Moreover, the Bankruptcy Court's findings of fact (paragraph 20) state that there are "more than 12,000 creditors of the Chicago Bank of Commerce [*who*] *have participated* in the distribution of funds collected from the stockholders of the Chicago Bank of Commerce" (Tr. 380), and this is also substantiated by the Bankruptcy Court's written opinion (Tr. 368). The balance of the "30,000 other creditors" who are referred to in Fetzer's own sworn petition (Tr. 94) comprise those creditors who have *not participated* therein.

But even if the Trustee's sworn allegations were wholly unproven by anything in the record, nevertheless the trial court and the Court of Appeals correctly assumed the sworn facts to be true *for the purposes of this appeal,* because the judgment appealed from was rendered upon the bankrupt's motion for summary judgment (Tr. 367, 384), without any opportunity being granted to either the Trustee in Bankruptcy or the creditors themselves to prove these sworn facts. The Court of Appeals therefore necessarily treated the sworn allegations in the Trustee's Petition as true, for all allegations in sworn pleadings are deemed to be true where the party alleging them has had no opportunity to prove them, but has been cut off from such opportunity by reason of a summary judgment precluding such proof. It has always been the rule that where a demurrer is sustained to a sworn pleading, or where an affirmative defense thereto is sustained and decree rendered, both the trial and appeal courts are compelled to

assume the truth of the sworn allegations which the losing party has had no opportunity to prove. *Butcher* v. *United Electric Coal Co.*, 174 F. (2d) 1003 (7th C.C.A.). To the same effect is *Beal* v. *Mo. Pac. R. Corp.*, 312 U.S. 45, 51, 85 L. Ed. 577, 580.

What is said above is equally applicable to the as yet unproven bankruptcy claim sworn to and filed by the New Jersey Equities Company (Tr. 335-6), which shows in paragraph 4 that the claimant is a member of the group of "non-participating" bankruptcy creditors because "no part of said debt has been paid."

But whether or not the New Jersey Equities Company can ultimately prove its bankruptcy claim, or whether or not we have correctly stated the number and amount of bankruptcy claims as "participating" and "non-participating," the fact remains that no such challenge can defeat the right of the Trustee in Bankruptcy to represent *all creditors,* "participating" and "non-participating" alike. This fact, and the further fact that the validity of the bankruptcy claim of the Elks is not effectively challenged in No. 445, makes the attack upon the New Jersey Equities Company claim in Respondents' Briefs entirely immaterial to the present appeal in No. 501.

III.

Both the Hillmer Brief (p. 3-4) and the Fetzer Brief (p. 4-5) argue that the Trustee in Bankruptcy had actual knowledge that the stockholders' representative suit was pending in the State Court long prior to July 18, 1951 when the State Court Order was entered.

The Trustee's knowledge of this fact is not the point at issue, and is irrelevant. The point is that neither the Trustee in Bankruptcy nor any of the other bankruptcy

creditors, including the Elks and the New Jersey Equities Company, who are Appellants in this proceeding, *ever had any prior knowledge or notice of the particular State Court proceedings commencing with the notice of July* 12, 1951 (Tr. 353) *and including the order of July* 18, 1951 (Tr. 348), *which are involved in the instant case.*

In this connection, the Court will recall that the trial court Judge "very distinctly asked the question . . . if all the attorneys were before me" at the time the July proceedings occurred (Tr. 394), and that the Judge required all of the attorneys before him to evidence their consent to the order of July 18, 1951 (Tr. 353, 393).

The order itself as copied in the record (Tr. 353) shows conclusively that neither the bankruptcy creditors referred to, nor the Trustee in Bankruptcy, were before the State Court or gave any assent to the State Court order. Thus it becomes irrelevant whether the Trustee or the creditors knew that the representative suit existed, for the plain fact is that insofar as that suit could possibly affect the bankrupt, George R. Joslyn, or the bankruptcy proceedings, neither the Trustee in Bankruptcy, nor the creditors mentioned had any prior notice or knowledge of such State Court proceedings whatsoever.

The italicized sentence in the middle of page 5 of the Fetzer Brief stating that advance notice of the State Court order of July 18, 1951 was given to "all persons entitled thereto" is a deliberately slippery sentence, for Respondents themselves contend that neither the Trustee in Bankruptcy, nor the bankruptcy creditors who are Petitioners in Nos. 445 and 501, were "persons entitled to such notice."

There were many reasons why both the Trustee in Bankruptcy and the petitioning bankruptcy creditors were en-

titled to rely exclusively upon their rights and remedies in the Bankruptcy Court, and therefore had no obligation and did not attempt to participate in the State Court proceedings, even though the existence of the State Court represenative suit was known to them. Among these reasons are:

(a) On May 20, 1946, long prior to the year 1951, on the very day the fraudulent bankruptcy was reopened, an injunction order was entered in the Bankruptcy Court "enjoining all persons from in any manner prosecuting any action or suit against the bankrupt" (Tr. 268), and this injunction was in full force and effect from the date of its entry in 1946 to and subsequent to the date of the decree appealed from which was entered on November 8, 1951 in the Bankruptcy Court (Tr. 384). This injunction order was entered under Section 2a(15) of the Bankruptcy Act, at the request of the Elks as a bankruptcy creditor, "to preserve the Estate and to prevent loss thereto," as the injunction itself shows. Both the Trustee in Bankruptcy and all of the bankruptcy creditors were entitled to rely upon the effectiveness of this injunction in preventing any interference with the bankruptcy by the entry of the State Court order of July 18, 1951 in question.

(b) Under date of January 29, 1949, also long prior to 1951, the United States Court of Appeals for the Seventh Circuit had issued its mandate in the case of *In re Joslyn*, 171 F. (2d) 159, directing that the bankruptcy proceedings "continue in the usual course" (Tr. 27-8, 250), and holding that it was the Trustees' duty to collect the administrable assets in the plenary action (171 F. (2d) 159, at 168). This was confirmed by the same Court of Appeals in the case of *Young* v. *Handwork*, 179 F. (2d) 70, cert. den. 339 U.S. 949, reh. den. 339 U.S. 991, which held

early in the year 1950 that the Trustee's plenary suit to collect the administrable assets should be reinstituted in the trial court and should "proceed in accordance with the conclusion" that the title to the assets sought to be collected therein had passed to the Trustee in Bankruptcy as of the date of the voluntary adjudication "as administrable assets" (179 F. (2d) 70, at p. 80). The Trustee and all of the bankruptcy creditors were thereby entitled to assume that both the bankruptcy proceeding and the Trustee's plenary suit to collect the administrable assets would proceed thereafter without any interference by orders to be entered by the State Court in the stockholders' representative suit.

(c) Both the bankrupt and Fetzer, *et al.* as intervening creditors, voluntarily filed their petitions in the Bankruptcy Court long prior to July 18, 1951, seeking to have the Bankruptcy Court adjudicate the very same issues which were later to become secretly the subject of the State Court order of July 18, 1951 (Tr. 41, 67, 92). In his petition, the bankrupt was offering to settle and pay all of his bankruptcy creditors voluntarily by payments in the Bankruptcy Court (Tr. 71, 142, 149-150, 155, 179). The Trustee in Bankruptcy had filed long prior to July 18, 1951 an answer to the bankrupt's petition (Tr. 77) and an answer to the intervening petition of Fetzer, *et al.*, as well as a counterclaim seeking affirmative relief in the sum of $18,757.99 for the benefit of the bankruptcy estate (Tr. 107-118), which answer was also adopted by the Elks and all of the other bankruptcy creditors who are Appellants in this proceeding (Tr. 104-7). Both the bankrupt and Fetzer, *et al.* had filed replies to such answers and counterclaim (Tr. 118-126). These petitions had all been referred to the Referee (Tr. 67, 102), who after extensive hearings limited thereto had rendered a full Referee's Re-

port (Tr. 127-183), recommending that the bankruptcy claims should be paid through the Bankruptcy Court (Tr. 155). This Report was pending upon objections and exceptions (Tr. 225-240), which the Bankruptcy Court had taken under advisement on April 20, 1951 (Tr. 242), before the July 18, 1951 order was entered. Both the Trustee in Bankruptcy and the bankruptcy creditors were entitled to rely upon the bankruptcy law precluding those who have voluntarily invoked the paramount and exclusive jurisdiction of the Federal Bankruptcy Court from thereafter attempting to withdraw therefrom by proceedings in a State Court so as to oust the Bankruptcy Court of such jurisdiction. *Case* v. *Los Angeles Lumber Products Co.*, 308 U.S. 106; *In re Norris Holding Co., Inc.*, 52 F. (2d) 499; *Page* v. *Arkansas National Gas Corp.*, 53 F. (2d) 27, aff'd 286 U.S. 269.

(d) Armin F. Hillmer, who was himself one of the plaintiffs in the stockholders' representative suit in the State Court, had filed a bankruptcy claim in the Bankruptcy Court on May 22, 1946 purportedly acting "on behalf of himself and all other creditors of said bank similarly situated, against George R. Joslyn as a stockholder of said bank" (Tr. 3-4), in which claim he sought not only to recover the principal amount of $57,100, but also interest thereon "from June 25, 1932 until date of payment." Both the Trustee in Bankruptcy and the bankruptcy creditors were entitled to assume that this bankruptcy claim voluntarily submitted the issue as to the bankrupt's stock liability to the exclusive jurisdiction of the Bankruptcy Court in lieu of the State Court case.

(e) The bankrupt, Joslyn, as a defendant in the stockholders' representative suit, had not withdrawn his defense of discharge in bankruptcy, and in fact never did withdraw such defense, even at the time the State Court

order of July 18, 1951 was entered. Both the Hillmer Brief (p. 4, 10) and the Fetzer Brief (p. 5-6) erroneously maintain that it may be *inferred* that Joslyn was not relying upon his discharge as a defense after the fraudulent bankruptcy was reopened on May 20, 1946. There is nothing in the record to support any such inference, and it is contrary to the holding of the Court of Appeals in *In re Joslyn*, 171 F. (2d) 159 at 167. The bankrupt did not participate in the State Court proceedings when the July 18, 1951 order was entered (Tr. 246, 353), no doubt because he knew that he would be plainly violating the injunction entered in the Bankkruptcy Court on May 20, 1946, if he did so (Tr. 268).

We have been at pains to disclose the true reasons why neither the Trustee in Bankruptcy nor any of the bankruptcy creditors participated in the State Court proceedings involving the stock liability of the bankrupt. In the light of the foregoing facts, there was no obligation upon them to take any action to stay proceedings in the State Court, in spite of Respondents' arguments to the contrary (Hillmer Brief, p. 10; Fetzer Brief, p. 4-5).

IV.

The State Court order was a "consent" decree.

Both Hillmer (p. 4) and Fetzer (p. 5-6) argue that the State Court order was not a "consent" decree, but was a "judicial" decree. This is not only contrary to the statements by the State Court Judge (Tr. 393-4), but is shown to be erroneous by the fact that all of the counsel appearing in the State Court filed their written consent thereto (Tr. 353). Under Illinois law, the endorsing of a decree with the letters "O.K." or the word "approved" by the attorneys, or merely by their signing the decree or orally

assenting thereto, makes the decree a "consent" decree. *City of Kankakee* v. *Lang*, 323 Ill. App. 14, 17, 19; *Bergman* v. *Rhodes*, 334 Ill. 137; *Consaer* v. *Wisniewski*, 293 Ill. App. 529; *Hungarian Ben. Soc.* v. *Aid Soc.*, 283 Ill. 99.

Moreover, the transcript of the proceeding before the State Court Judge shows that he was merely sitting in the emergency court hearing emergency motions in the summer vacation, and that no actual evidence was offered or trial had before him (Tr. 388-395).

V.

The irrelevant charge of "blackmail".

The Joslyn Brief (p. 2-4) argues that the Trustee in Bankruptcy asserted an equitable lien on the bankruptcy estate in the Bankruptcy Court, and charges that this was part of a scheme "for the purpose of blackmail", citing certain remarks by Judge Shaw in the Bankruptcy Court. Both briefs again (also see Fetzer Brief, p. 7) drag in the irrelevant case of *Joslyn* v. *Joslyn*, 337 Ill. App. 443, in support of these contentions.

These charges are not only wholly irrelevant, but are also *conclusively disproved* by the decision of the Court of Appeals *which reviewed and reversed Judge Shaw*. We quote from the Court of Appeals in its opinion in 179 F. (2d) 361 at p. 368:

> "It was this proposed settlement [offered by the fraudulent bankrupt himself] that Judge Shaw characterized as 'blackmail.' But certainly it was not blackmail on the part of Fisher who was a stranger to this incident or upon the part of the Trustee in Bankruptcy who also was ignored. We need not relate the conditions which were attached to this proposed settlement but it is sufficient to note that it was such as to make it doubtful if any court would have approved such proposal even though it would have been agreeable to all concerned."

The Court of Appeals' decision in *In re Joslyn's Estate*, 168 F. (2d) 803 at 807 was to the effect that no such lien claim had ever been asserted in the Bankruptcy Court, which was the precise reason why the Court of Appeals reversed the trial court therein.

Moreover, it has never been the law that any lien claimant is barred from asserting his lien, if he wishes to do so, in a bankruptcy proceeding. Both the bankrupt himself (Joslyn Brief, p. 13-14 in No. 445) and Fetzer *et al.* (Tr. 41, 92; Fetzer Brief, p. 9) asserted lien claims in the bankruptcy proceedings. It is obviously one of the purposes of a bankruptcy proceeding to permit all claimants, whether they claim liens or are general or priority creditors, to assert their respective claims against the bankruptcy estate in the Bankruptcy Court. *That is what the bankruptcy case is for.*

VI.

Respondents' arguments assume that the State Court Order superseded the paramount and exclusive jurisdiction of the Bankruptcy Court.

Many of the Respondents' arguments are circuitous in that they assume the effectiveness of the order appealed from to terminate the bankruptcy proceedings in the Bankruptcy Court. In other words, they assume the point at issue.

For example, Hillmer (p. 2) argues that the New Jersey Equities Company is not a bankruptcy creditor upon the ground that all of the bankruptcy claims "have been fully satisfied and released" in the State Court, so that all of the claimants are no longer bankruptcy creditors (p. 17). Similarly, Hillmer argues (p. 5) that no interest is due the bankruptcy creditors, because they are no longer credi-

tors. From this the conclusion is drawn that no harm has been done the bankruptcy creditors and there is no public importance to this case (Hillmer, p. 7; Fetzer, p. 6-7), upon the ground that the State Court order "merged the stockholder's liability of the bankrupt," which "extinguished" the liability so that it was "satisfied in open court." Joslyn (p. 11) reaches the conclusion on the same basis that this case is "moot," because of the recent amendment to the Illinois Constitution.

As we have said, all of these arguments are circuitous in that they assume the point at issue. Of course, if the State Court order was binding upon the Bankruptcy Court, then the order appealed from should not be reversed. But the question in the case is whether the Bankruptcy Court had the right to abdicate its paramount and exclusive jurisdiction, and none of the Respondents denies that this conflict of jurisdiction between the Bankruptcy Court and the State Court is the very heart of this case.

We need pay no attention to Joslyn's statement in his "Conclusion" (p. 11) that the bankrupt's stock liability has been abolished by the recent Illinois constitutional Amendment. In effect he misquotes the amendment. The amendment itself (Joslyn Brief, No. 445, p. 16, Appendix) expressly preserves existing bank creditor's rights, and all of the bankruptcy claims in this case are preserved by this reservation.

CONCLUSION.

For the reasons stated above in this reply, Petitioners submit that Respondents' Briefs concede that the fundamental issue in this case is the important conflict of jurisdiction between the State Court and the Bankruptcy Court.

While we have been at pains to answer the arguments in Respondents' Briefs, we have not conceded their relevancy by so doing.

The decision herein appealed from constitutes a most dangerous precedent, seriously and adversely affecting the future administration of all bankruptcy proceedings in the Federal courts.

The writ of certiorari should issue as prayed in our Petition.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1952.

Nos. 445 AND 501

IN THE MATTER OF GEORGE R. JOSLYN, BANKRUPT.

THE BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA, AND HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY,
Petitioners,

vs.

THE SUPERIOR COURT OF COOK COUNTY, ILLINOIS, THE HONORABLE SAMUEL B. EPSTEIN, JUDGE OF THE SUPERIOR COURT OF COOK COUNTY, ILLINOIS, AND GEORGE R. JOSLYN, BANKRUPT,
Respondents.

MOTION FOR WRIT IN THE NATURE OF MANDAMUS, PROHIBITION, INJUNCTION, OR OTHER APPROPRIATE REMEDY, AND BRIEF IN SUPPORT THEREOF.

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MOTION FOR WRIT IN THE NATURE OF MANDAMUS, PROHIBITION, INJUNCTION, OR OTHER APPROPRIATE REMEDY, AND BRIEF IN SUPPORT THEREOF.

To The Honorable Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Petitioners, The Benevolent And Protective Order Of Elks Of The United States Of America (herein called the

"Elks") and Horace A. Young, as Trustee in Bankruptcy, respectfully present this motion as an emergency matter for the reasons shown below and show unto this Honorable Court as follows:

A.

Basis of Jurisdiction.

Jurisdiction is invoked under 28 U.S.C. 1651 (a).

B.

Basis of Relief Sought.

(1) The Elks has heretofore filed in this Court as Docket No. 445 its Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, and Brief in support thereof, which Petition and Brief are incorporated herein by specific reference thereto. New Jersey Equities Company and Horace A. Young, as Trustee in Bankruptcy, have likewise filed in this Court as Docket No. 501 their Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, and Brief in support thereof, which Petition and Brief are incorporated herein by specific reference thereto.

(2) The principal issue raised in both of the foregoing Petitions for Certiorari is whether the decision of the United States Court of Appeals for the Seventh Circuit, affirming an order of the District Court, rends asunder the entire fabric of bankruptcy law so as to defeat the paramount and exclusive jurisdiction of the Bankruptcy Court in the bankruptcy proceeding of George R. Joslyn by abdicating its functions in favor of the State Court, and thereby establishes a precedent seriously and adversely affecting the future administration of all Federal bankruptcy proceedings. The basis of the decree appealed from which was entered in the District Court and affirmed in the Court

of Appeals, is a so-called "Order on Petition" entered in the Superior Court of Cook County, Illinois, on July 18, 1951, which appears at Tr. 348-353 of the printed Transcript of Record in these proceedings, Nos. 445 and 501, and an amendment thereto entered in said Superior Court of Cook County, Illinois, on September 20, 1951 by the Honorable Samuel B. Epstein, Judge of said Court, which appears at Tr. 357-8 of the printed Transcript of Record.

(3) Said orders entered on July 18, 1951 and September 20, 1951 contain *inter alia* the following permanent injunction against Petitioners and others, to-wit:

> "It Is Further Ordered, Adjudged and Decreed that each and every creditor of the said Chicago Bank of Commerce, their agents and attorneys, be and they are individually and severally permanently enjoined and restrained from instituting and from prosecuting any claims, demands, actions, causes of action, proceedings at law or in equity, against George R. Joslyn on account of any claim, demand, debt or right arising because of George R. Joslyn owning 1142 shares of capital stock of the Chicago Bank of Commerce.
>
> It Is Further Ordered that the Clerk of this Court shall issue a People's Writ of Injunction directed to each and every creditor of the Chicago Bank of Commerce individually and severally and permanently enjoining and restraining them from instituting and from prosecuting any claims, demands, actions, causes of action, proceedings at law or in equity against George R. Joslyn on account of any claim, demand, debt or right arising because George R. Joslyn owned 1142 shares of the capital stock of the Chicago Bank of Commerce." (Tr. 352.)
>
> • • •
>
> "It Is Ordered that the injunction order heretofore entered herein on July 18, 1951 be, and the same is hereby, amended by inserting the following words at the end of each of the first two complete paragraphs on page 6 of said order, to wit:

"Provided, however, that said creditors of Chicago Bank of Commerce, their agents and attorneys, are not enjoined or restrained from prosecuting their rights in the bankruptcy proceeding now pending in the United States District Court for the Northern District of Illinois, Eastern Division, entitled 'In the matter of George R. Joslyn, Bankrupt,' No. 62732; *provided, further, that said creditors are individually and severally permanently enjoined and restrained from claiming or asserting in said bankruptcy proceeding that the stockholders liability of George R. Joslyn by reason of his ownership of* 1142 *shares of capital stock of Chicago Bank of Commerce, including liability for interest, if any, exceeds the sum of* $57,100 *heretofore paid to Luke F. Cunniff, Receiver herein, and from claiming or asserting in said bankruptcy proceeding that said stockholder's liability of George R. Joslyn has not been released and satisfied in full pursuant to said order of July* 18, 1951 *heretofore entered herein.*" (Tr. 357-8.) (Italics added.)

(4) As is fully shown by the Petitions for Certiorari filed herein in Nos. 445 and 501 as aforesaid, it is essential to Petitioners' right to petition to this Court for said Writs of Certiorari that Petitioners disclose to this Court the fact that the paramount and exclusive jurisdiction of the Federal Bankruptcy Court in said bankruptcy proceeding entitled "In the matter of George R. Joslyn, Bankrupt" has been invaded and defeated by the order of the District Court herein appealed from and affirmed by the Court of Appeals. It is also essential to such right that Petitioners disclose to this Court that said order of the District Court, and the findings of fact and conclusions of law upon which it is based, terminates the administration of said bankruptcy proceeding upon the theory that the stockholder's liability of George R. Joslyn has been released and satisfied by said orders previously entered in the Superior Court of Cook County, Illinois (Tr. 371-387).

(5) On December 16, 1952, which date was after the filing of the Petitions for Certiorari in Nos. 445 and 501 aforesaid in this Court, George R. Joslyn, Respondent, presented to the Honorable Samuel B. Epstein, Judge of said Superior Court of Cook County, Illinois, in the same cause in which the foregoing permanent injunctions were rendered, his Petition entitled "*Petition to Hold Thomas Hart Fisher, Norman Crawford, Horace Young, John S. Miller, Mario H. Guiarelli and Benevolent and Protective Order of Elks of the United States of America in Contempt.*" The sole purport of said Petition is that the foregoing Respondents should be required and ordered to show cause why they should not be held in contempt of the Superior Court of Cook County, Illinois and punished for violation of the permanent injunctions aforesaid. John S. Miller and Horace Young, who are named as Respondents in the foregoing Petition, are attorneys for Petitioners seeking Writs of Certiorari in Nos. 445 and 501 in this Court. Benevolent and Protective Order of Elks of the United States of America, named as Respondent in said Petition, is the Petitioner seeking a Writ of Certiorari in Docket No. 445 in this Court. Horace A. Young, named as Respondent in said Petition, is one of the Petitioners seeking a Writ of Certiorari in Docket No. 501 in this Court.

(6) It is alleged in said Contempt Petition that the Respondents "acting in conjunction with each other filed with the Clerk of the Supreme Court of the United States a Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals, Exhibit F attached hereto [same being the Petition in No. 445]." It is further alleged therein that in and by said Certiorari Petitions the Respondents "are contending before said court [the Supreme Court of the United States]

that the stockholder's liability of petitioner [George R. Joslyn] has not been discharged, [and] that petitioner is liable for interest, in open, wilful and flagrant violation of the injunction herein [the two injunction orders aforesaid]."

(7) The prayer of the foregoing Petition of George R. Joslyn filed in the Superior Court of Cook County, Illinois as aforesaid is as follows:

> "Wherefore, petitioner [George R. Joslyn, the Bankrupt herein] respectfully prays:
>
> 1. That a rule shall be entered herein that Thomas Hart Fisher, Norman Crawford, Horace Young, John S. Miller, Mario H. Guiarelli and the Benevolent and Protective Order of the Elks shall show cause, if any they have, why they should not be punished for contempt of court, and
>
> 2. That the court will duly punish said Respondents for violation of the injunction as aforesaid."

(8) The foregoing Petition presented to the Superior Court of Cook County, Illinois, by George R. Joslyn as aforesaid is signed and sworn to by George R. Joslyn.

(9) The foregoing contempt proceedings now pending in the Superior Court of Cook County, Illinois, as aforesaid are designed to have the effect, and will have the effect, of interfering with the right of Petitioners seeking such Writs of Certiorari in Nos. 445 and 501 to prosecute their Petitions for Certiorari in this Court as aforesaid. Said contempt proceedings thereby interfere with the appellate jurisdiction of this Court in said certiorari proceedings Nos. 445 and 501, and with the constitutional and statutory rights of the Petitioners, and their counsel, to file and prosecute said certiorari proceedings in Nos. 445 and 501 in this Court.

(10) Said contempt proceedings likewise interfere with the paramount and exclusive jurisdiction of the Federal Bankruptcy Courts in general, and in particular with the bankruptcy jurisdiction of the District Court of the United States, the United States Court of Appeals for the Seventh Circuit and the Supreme Court of the United States in said proceeding entitled "In the matter of George R. Joslyn, Bankrupt," originally commenced as No. 62732 in said District Court, and now before this Court in Nos. 445 and 501.

(11) Petitioners have no effective right of direct appeal from said contempt proceedings to protect the appellate jurisdiction of this Court and their constitutional and statutory rights to invoke the same in this Court. Petitioners are, however, entitled by writ in the nature of mandamus, prohibition, injunction or other appropriate remedy to compel the Superior Court of Cook County, Illinois, and the other Respondents hereinabove named in this motion, to withhold all further action in said contempt proceedings pending final disposition by this Court of said certiorari proceedings Nos. 445 and 501. Unless such relief be granted by this Court as prayed herein, Petitioners are under the present threat of being held in contempt and punished in the State Court for invoking the jurisdiction of this Court by prosecuting their certiorari proceedings Nos. 445 and 501.

(12) This Honorable Court is the only court which, in aid of its appellate jurisdiction from the District Court and the United States Court of Appeals for the Seventh Circuit in said certiorari proceedings Nos. 445 and 501, has full and complete jurisdiction to stay said contempt proceedings in and by the Superior Court of Cook County, Illinois, and the other Respondents hereinabove named in this motion; and this Honorable Court is the only Court in

which Petitioners may obtain adequate relief to prevent interference with the exercise by this Court of its appellate jurisdiction in said certiorari proceedings Nos. 445 and 501.

(13) Petitioners have no other effective remedy except by a writ in the nature of mandamus, prohibition, injunction, or other appropriate remedy, to compel the Superior Court of Cook County, Illinois, and the other Respondents named in this motion to stay all further contempt proceedings as aforesaid until final disposition of said certiorari proceedings by this Court in Nos. 445 and 501.

(14) Petitioners are wholly without adequate remedy in the premises unless their motion be granted herein.

Wherefore, Petitioners respectfully pray herein:

(1) That this Honorable Court will direct the Superior Court of Cook County, Illinois, the Honorable Samuel B. Epstein, Judge of said Court, and George R. Joslyn, Bankrupt, Respondents herein, to show cause why a writ in the nature of mandamus, prohibition, injunction or other appropriate remedy should not issue against them and each of them in accordance herewith.

(2) That this Honorable Court will direct the Superior Court of Cook County, Illinois, and the Honorable Samuel B. Epstein, Judge thereof, and George R. Joslyn, bankrupt, forthwith to stay the foregoing contempt proceedings pending final disposition of the Petitions for Certiorari in Nos. 445 and 501 now pending in this Court.

(3) That this Honorable Court will grant such other and further relief to Petitioners as may be just and meet in the premises.

(4) That this Honorable Court will retain jurisdiction herein for any further or other action or orders as may be required in the premises.

The Benevolent and Protective Order of Elks of the United States of America, and Horace A. Young, as Trustee in Bankruptcy,

By .....
JOHN S. MILLER,

By .....
HORACE A. YOUNG, as Trustee in Bankruptcy *Pro Se*,
Their Attorneys,
Petitioners.

State of Illinois,
County of Cook—ss.

JOHN S. MILLER, being first duly sworn, on oath deposes and says that he is one of the attorneys for the Petitioners above named; that he is personally acquainted with all of the matters and things therein set forth; and that affiant is informed and believes, and on the basis thereof states, that all of the facts therein set forth are true and correct to the best of his knowledge and belief.

.....
JOHN S. MILLER

Subscribed and sworn to before
me this 6th day of January, 1953.

.....
Alma Holmes,

Notary Public in and for the County of Cook, State of Illinois.

IN THE

Supreme Court of the United States

OCTOBER TERM 1952.

Nos. 445 AND 501

IN THE MATTER OF GEORGE R. JOSLYN, BANKRUPT.

THE BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA, AND HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY,

Petitioners,

vs.

THE SUPERIOR COURT OF COOK COUNTY, ILLINOIS, THE HONORABLE SAMUEL B. EPSTEIN, JUDGE OF THE SUPERIOR COURT OF COOK COUNTY, ILLINOIS, AND GEORGE R. JOSLYN, BANKRUPT,

Respondents.

BRIEF IN SUPPORT OF MOTION FOR WRIT IN THE NATURE OF MANDAMUS, PROHIBITION, INJUNCTION, OR OTHER APPROPRIATE REMEDY.

To The Honorable Chief Justice And Associate Justices Of The Supreme Court Of The United States:

This motion is made pursuant to Section 1651(a) of the Federal Judicial Code (28 U.S.C. §1651(a)) which provides as follows:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The facts upon which this motion is based are clearly set forth in the motion, as well as in the Petitions for Certiorari heretofore filed in this Court in Nos. 445 and 501. The fundamental issue in both Petitions concerns a direct conflict in jurisdiction between the Federal Bankruptcy Court and the Illinois State Court.

The injunction orders entered in the Superior Court of Cook County, Illinois, on July 18, 1951 and September 20, 1951, insofar as they enjoin the prosecution of bankruptcy proceedings in the Federal Bankruptcy Court, constitute a palpable invasion of the paramount and exclusive jurisdiction of the Federal Bankruptcy Court in bankruptcy proceedings. The Federal cases in this Court and the Courts of Appeals so holding are set forth on pages 26 and 27 of the Petition for Certiorari in No. 445.

That injunction orders of this type may not properly enjoin bankruptcy creditors and their agents and attorneys from exercising their rights freely in the Federal Bankruptcy Courts under the Federal Constitution and Federal Bankruptcy Act is too plain and obvious for discussion or argument. Even the Courts of Illinois have condemned such orders and have held them to be void. *City National Bank & Trust Co.* v. *Davis Hotel Corp.*, 280 Ill. App. 247, 252 (1935); *DeKalb Trust and Savings Bank* v. *DePaul*, 278 Ill. App. 102 (1934).

But regardless of the legality or illegality of said injunction orders themselves, it is elementary that this Court, acting in aid of its appellate jurisdiction, may and should issue writs of mandamus, prohibition, or injunction, or grant other appropriate relief to prevent any other court, or any litigants therein, from interfering either by contempt citations, or otherwise, with the appellate jurisdiction of this Court, or with the rights of all litigants properly before the Court in pending certiorari proceedings to prosecute the same in due course.

We cite:

Ex parte Republic of Peru, 318 U.S. 578 (1943);
Ex parte United States, 287 U.S. 241 (1932);
Smith v. *Whitney*, 116 U.S. 167 (1886).

See also the following cases in which this Court, although denying the writ on the particular facts, recognized the above stated principle of law:

Ex parte Fahey, 332 U.S. 258 (1947);
Ex parte United States, 263 U.S. 389 (1923);
Fisher v. *Hurst*, 333 U.S. 147 (1948)..

The institution of said contempt proceedings at the very time that the Certiorari Petitions are pending in this Court in Nos. 445 and 501 brings sharply to focus before this Court the fundamental conflict of jurisdiction between the paramount and exclusive jurisdiction of the Federal Bankruptcy Court in bankruptcy matters, on the one hand, and the jurisdiction of the Superior Court of Cook County, Illinois, on the other hand, and the attempts of the State Court to interfere with the Federal jurisdiction, which is the central issue in said Petitions.

The brazen attempt to interfere with the appellate jurisdiction of this Honorable Court in the certiorari proceedings in Nos. 445 and 501 by the institution of said contempt proceedings in the Illinois State Court, in the effort thereby to deprive the Petitioners in said certiorari proceedings of their right to prosecute the same before this Court, is not only an improper and illegal action in itself, but also characterizes the actions of the Bankrupt throughout the course of this proceeding both in the District Court and in the United States Court of Appeals for the Seventh Circuit.

Surely this Court will be amazed, if not affronted, that any litigant in any other court, State or Federal, should

seek to bar the door of this Court to a lawful and proper application for relief in this Court in certiorari proceedings.

Petitioners respectfully submit that the relief prayed in this motion should be promptly and forthwith granted by this Honorable Court.

Respectfully submitted,

The Benevolent and Protective Order of Elks of the United States of America, and Horace A. Young, as Trustee in Bankruptcy,

By .....
JOHN S. MILLER,

By .....
HORACE A. YOUNG, as Trustee in Bankruptcy *Pro Se*,
Their Attorneys,
Petitioners.

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FILED
JAN 31 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

Nos. 445 and 501

IN THE MATTER OF GEORGE R. JOSLYN, Bankrupt.

THE BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA, AND HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY,

Petitioners,

vs.

THE SUPERIOR COURT OF COOK COUNTY, ILLINOIS, THE HONORABLE SAMUEL B. EPSTEIN, JUDGE OF THE SUPERIOR COURT OF COOK COUNTY, ILLINOIS, AND GEORGE R. JOSLYN, BANKRUPT,

Respondents.

OBJECTIONS OF GEORGE R. JOSLYN TO THE MOTION FOR A WRIT IN THE NATURE OF MANDAMUS, ETC., AND SUGGESTIONS.

ALVIN GLEN HUBBARD,
Attorney for George R. Joslyn.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

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IN THE MATTER OF GEORGE R. JOSLYN, Bankrupt.

THE BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA, AND HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY,
Petitioners,

vs.

THE SUPERIOR COURT OF COOK COUNTY, ILLINOIS, THE HONORABLE SAMUEL B. EPSTEIN, JUDGE OF THE SUPERIOR COURT OF COOK COUNTY, ILLINOIS, AND GEORGE R. JOSLYN, BANKRUPT,
Respondents.

OBJECTIONS OF GEORGE R. JOSLYN TO THE MOTION FOR A WRIT IN THE NATURE OF MANDAMUS, ETC., AND SUGGESTIONS.

Now comes GEORGE R. JOSLYN and objects to the Motion for a Writ of Mandamus, Prohibition, Injunction or other appropriate remedy.

A.

There is no basis for any supposed jurisdiction.

B.

STATEMENT.

On September 13, 1951 the Elks by John S. Miller, Thomas H. Fisher and Norman Crawford, its attorneys, presented a fifteen-page petition to the Superior Court of Cook County, Illinois, in *Hillmer* v. *Chicago Bank of Commerce,* No. 560305. (Tr. 294-310.) Petitioner asked that the decree of July 18, 1951 be vacated as being null and void. It prayed that the State Court receiver be restrained from disbursing the $57,100 paid in. (Tr. 309.) This money had been paid by George R. Joslyn's father. (Tr. 377.)

On September 20, 1951 the Superior Court entered a final decree on this petition. The Court found

> "that the allegations of said petition constitute no ground for any of the relief prayed." (Tr. 294.)

That the bankruptcy trustee joined in the proceedings in the State Court appears from the Elks' petition:

> "Upon learning of the foregoing proceedings in the state court the trustee in bankruptcy and the Elks unsuccessfully endeavored in the state court to have the state court order vacated and to induce the bankruptcy court not to enter the final decree appealed from." (Elks' Pet. for Certiorari, p. 8.)

The Bankruptcy trustee and New Jersey Equities repeat said statement,

> "Petitioners adopt in all respects the petition of the Benevolent and Protective Order of the Elks." (Young & N. J. Eq. Pet. for Certiorari, p. 2.)

The order modifying the decree was entered in the Superior Court on September 20th, 1951. (Tr. 294; Tr. 357-58.) Every matter which the Trustee, the Elks and the other purported creditors seek to litigate here they liti-

gated in the Superior Court of Cook County, Illinois. At the conclusion the court entered the two decrees on September 20th, 1951.

PROPOSITIONS OF LAW.

I.

SINCE THE STATE COURT PROCEEDINGS DO NOT SEEK TO INTERFERE WITH ANY RES IN THE ACTUAL OR CONSTRUCTIVE POSSESSION OF THE UNITED STATES COURT, THERE IS NO BASIS FOR AN INJUNCTION RESTRAINING THE STATE COURT PROCEEDINGS.

Kline v. *Burke Constr. Co.* (1922), 260 U. S. 226.

Mandeville v. *Canterbury* (1943), 318 U. S. 47.

United States Code Title 28, Sec. 2283.

"S. 2283. Stay of State Court Proceedings.

"A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. June 25, 1948, c. 646, 62 Stat. 968."

A.

Under Illinois Law the Court Properly Enjoined the Thousands of Creditors of the Bank From Suing.

Groves v. *Farmers State Bank* (1938), 368 Ill. 35, 47-48; 12 N. E. 2d 618.

Decker v. *Domoney* (1944), 387 Ill. 524, 529; 56 N. E. 2d 750.

Babka Plastering Co. v. *City State Bank* (1931), 264 Ill. App. 142 at 153.

Leonard v. *Bye* (1935), 361 Ill. 185, 190, 192; 197 N. E. 546.

Walton v. *Albers* (1942), 380 Ill. 423; 44 N. E. 2d 145.

B.

Having Entered the Injunction, It Is Proper for the Superior Court to Enforce It.

In Re Metz (1925, 2d Cir.), 6 Fed. (2d) 962.

In re Broadway Hotel Co. (1941, 7th Cir.), 124 Fed. (2d) 891.

Union Oil of Cal. v. *Domengeaux* (1939), 86 Pac. (2d) 127 at 131; 30 Cal. App. (2d) 266.

Strickland v. *Darsey* (1923), 156 Ga. 717; 120 S. E. 7.

ARGUMENT.

I.

SINCE THE STATE COURT PROCEEDINGS DO NOT SEEK TO INTERFERE WITH ANY RES IN THE ACTUAL OR CONSTRUCTIVE POSSESSION OF THE UNITED STATES COURT, THERE IS NO BASIS FOR AN INJUNCTION RESTRAINING THE STATE COURT PROCEEDINGS.

In *Kline* v. *Burke Constr. Co.* (1922), 260 U. S. 226 the construction company filed a bill ancillary to an action at law in the United States District Court to enjoin proceedings instituted in the state court after its action at law. After stating that in proceedings *in rem* or *quasi in rem* the first court obtaining jurisdiction of the *res* retains same to the exclusion of other courts of concurrent jurisdiction, the court said:

> "But a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of *res adjudicata* by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case. The rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, an-

other action for the same cause in another jurisdiction is not precluded."

Kline v. *Burke Constr. Co.*, 260 U. S. 226 at 230.

In this case George R. Joslyn's father paid the claim in the State Court. (Tr. 377.) The Superior Court by its decree does not adjudicate any rights in any *res* in the actual or constructive possession of the U. S. District Court.

In *Mandeville* v. *Canterbury* (1943), 318 U. S. 47, the plaintiffs in U. S. District Court sought construction of a will. Defendants sued in Minnesota and Wisconsin seeking construction of the will. The U. S. District Court enjoined the two proceedings. The Court referred to Section 265 (now Section 2283) of the Judicial Code and the exception where the court had *a res* with which it was called upon to deal, and said:

"But where the judgment sought is strictly *in personam* for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation at least until judgment is obtained in one court, which may be set up as *res judicata* in the other."

Mandeville v. *Canterbury*, 318 U. S. 47 at 49.

In the State Court proceeding Joslyn's father paid the liability. Upon receipt of payment the court restrained the thousands of creditors from suing George R. Joslyn. It did not by its decree seek to interfere with any *res* in the possession or control of any other court.

A.

Under Illinois Law the Court Properly Enjoined the Thousands of Creditors of the Bank From Suing.

It is basic Illinois law that in a representative suit the court will enjoin the numerous creditors from suing in separate actions.

See cases cited under this Point Under Propositions of Law.

See Opinion of Judge Hoffman who entered the State Court Decree. (Tr. 396-397.)

B.

Having Entered the Injunction, It Is Proper for the Superior Court to Enforce It.

In re Metz (1925 2d Cir.), 6 Fed. (2d) 962, Dealy obtained a judgment *in tort* against Metz in the State Court. On October 26, 1923 Metz filed a petition in bankruptcy. On November 7, 1923 the State Court ordered him to pay the judgment as a fine. On December 15, 1923 the State Court adjudged him in contempt for not paying. The District Court enjoined the State Court proceedings.

Reversing the order, the Court of Appeals held that the District Court could not enjoin the State Court proceedings in the absence of a showing that the debt was dischargeable.

In re Broadway Hotel Co. (1941, 7th Cir.), 124 Fed. (2d) 891 one Thomas sued the bankruptcy trustees in the state court for libel. The Bankruptcy Court enjoined the State Court proceeding. Reversing the judgment the court said:

"The suit commenced by the appellant in the Circuit Court of Cook County, Illinois, was not a suit in

which the plaintiff (appellant here) sought to interfere with property in the custody of the bankruptcy court, nor was the restraining order necessary to effectuate any decree entered by the District Court in the reorganization proceeding."

In re Broadway Hotel Co., 124 Fed. (2d) 891 at 891.

In *Union Oil Co. of Cal.* v. *Domengeaux* (1939), 86 Pac. (2d) 127 at 131; 30 Cal. App. (2d) 266, the Oil Company sought an injunction against the bankruptcy trustee and others from acts done on land belonging to plaintiff. The court held that the bankruptcy trustee was amenable to the injunction suit.

In *Strickland* v. *Darsey* (1923), 156 Ga. 717; 120 S. E. 7 Darsey instituted proceedings in the State Court to set aside a fraudulent conveyance to A. J. Strickland. The court appointed a permanent receiver. The debtor, namely J. B. Strickland, was afterwards adjudicated a bankrupt. In ancillary proceedings the court restrained and enjoined A. J. Strickland from asserting or proving up in the bankruptcy proceeding his supposed claim. The Supreme Court of Georgia held the action proper.

It is respectfully submitted that the motion is without merit and should be denied.

Respectfully submitted,

ALVIN GLEN HUBBARD,
Attorney for George R. Joslyn.